No. 75-1813

In the Supreme Court of the United States

OCTOBER TERM, 1976

NICHOLAS CIVELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

(Continued)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 533 F. 2d 1395.

QUESTIONS PRESENTED

1. Whether the government's failure to notify petitioners that they were overheard during a telephone interception within ninety days of the end of the authorized period of interception warrants the suppression of the evidence obtained against them, when there was no showing of prejudice resulting from the delay.

2. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person who the government has probable cause to believe will be overheard participating in conversations about illegal activities.

3. Whether the inadvertent misidentification of the maker of the affidavit supporting a telephone interception application requires the suppresssion of evidence obtained through the interception.

STATEMENT

After a jury-waived trial in the United States District Court for the Western District of Missouri, petitioners were convicted, together with Joseph Barletta and Thomas Fontanello, of conspiring to conduct an illegal gambling business, and of using facilities of interstate commerce in furtherance thereof, in violation of 18 U.S.C. 371, 1084(a), and 1952. Each petitioner was sentenced to 42 months' imprisonment; in addition, the Civellas were each fined $5,000, and Tousa was fined $2,000. The court of appeals affirmed (Pet. App. A-22).[1]

1. On January 7, 1970, Judge William Collinson of the United States District Court for the Western District of Missouri issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, authorizing the interception of wire communications of Frank Tousa over a telephone at the Northside Social Club in Kansas City, Missouri. (Pet. App. A-3). The interception was authorized for ten days beginning on January 8, 1970; it actually ended by January 17, 1970. (*Ibid.*)

Acting pursuant to 18 U.S.C. 2518(8)(d), Judge Collinson on March 25, 1970, ordered inventory notices served on Tousa (who alone had been named in the wire interception order), the Civellas, and others who were never

[1]It reversed the convictions of Barletta and Fontanello (Pet. App. 21a-22a). The government has petitioned for a writ of certiorari, No. 76-169, seeking review of this reversal.

indicted, informing them that certain of their communications had been intercepted. Tousa was served with such notice on April 23, 1970, and both of the Civellas were served on May 1, 1970. In October 1970 and March 1971, successive indictments were filed against petitioners, and in October 1971, a final superseding indictment was returned, upon which petitioners were tried and convicted in mid-1975 (Pet. App. A-6).

2. As established by stipulation and summarized by the court below,[2] the facts revealed that between July 1968 and January 1970 petitioners were involved in a large scale gambling operation, prohibited by Missouri law, which entailed accepting wagers on various athletic contests (Pet. App. A-5). The operation was run from the Northside Social Club primarily for the benefit of Nicholas Civella (the reputed head of organized crime in Kansas City and owner of the Club) by Tousa and Nicholas' nephew, Anthony Civella (Pet. App. A-4, A-5).

3. The court of appeals found that the government has sufficient probable cause to name both the Civellas in the interception application, and that consequently naming only Tousa constituted a technical noncompliance with the requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a). The court held, however, that under the particular circumstances of this case, suppression of evidence was not warranted for this noncompliance. (Pet. App. A-18, A-19).[3]

[2]Petitioners stipulated to the facts which constituted the essence of Count five of the indictment in which they were charged.

[3]The court of appeals followed the reasoning and result of *United States* v. *Doolittle*, 507 F. 2d 1368, adhered to in rehearing *en banc*, 518 F. 2d 500 (C.A. 5), petition for a writ of certiorari pending, No. 75-513.

The court also rejected petitioners' contentions with respect to the service of the inventory notices and the sufficiency of the affidavit supporting the intercept application. It held that the error involving the affidavit was "merely clerical" (Pet. App. A-11a), and that, since there was no evidence of governmental bad faith and because the inventories were served sufficiently in advance of the indictment, the government had substantially complied with the inventory requirement (Pet. App. 21-23). In short, the court of appeals concluded that suppression of the evidence as to the three petitioners was not warranted.

ARGUMENT

Petitioners principally contend that certiorari should be granted here because the Court has already agreed to review similar issues in *United States* v. *Donovan*, No. 75-212, certiorari granted February 23, 1976. The inventory notice issues in *Donovan* and this case are substantially different: here, the question is only whether the late service of inventory notices warrants suppression, not, as in *Donovan*, the extent of the government's obligation to inform the court concerning those upon whom such service might be appropriately ordered. The other issue in *Donovan* is whether the government must identify, in the application for a wire interception order, all persons whom the government has probable cause to believe it will overhear participating in conversations about illegal activities. But regardless of this Court's resolution of that issue, the affirmance of the convictions of petitioners Tousa and Nicholas Civella was correct; Tousa was named in the application and order, and there was no probable cause to believe that petitioner Nicholas Civella would be overheard. Thus, only petitioner Anthony Civella's case turns on this Court's decision in *Donovan*.

1. The delay in the service of inventory notices on petitioners does not warrant the suppression of the intercepted evidence against them. Section 2518(8)(d) provides that inventory notice, when required, shall be given "[w]ithin a reasonable time but not later than ninety days" after the termination of an interception order. Petitioner Tousa was served with inventory notices on April 23, 1970, five days after the expiration of that ninety day period; the Civellas were served on May 1, 1970, thirteen days thereafter.[4] Petitioners do not claim they were prejudiced by the minor delay; they argue, relying on the court of appeals decision in *Donovan*, that the inventory notice provision "plays a central role in the statutory scheme" (Pet. 15), and that failure to comply strictly with the inventory provision requires automatic suppression.

This Court has construed Section 2518(10)(a)(i) of the Act, providing for suppression of communications "unlawfully intercepted," to mandate suppression not for "every failure to comply fully with any requirement provided in Title III" (*United States* v. *Chavez*, 416 U.S. 562, 574-575), but only if such failures involve "any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device" (*United States* v. *Giordano*, 416 U.S. 505, 527). For the reasons noted in our *Donovan* brief, a copy of which we are serving on petitioners, the inventory

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[4]The record does not indicate why the inventories were not served in time. Service was accomplished five months before petitioners were indicted the first time and seventeen months before the return of the third indictment, upon which they were ultimately convicted in 1975.

notice provisions are not such statutory requirements. In any event, the 90 day notice period can hardly be considered a direct and substantial means of implementing the intent to limit the use of the intercept procedures. Accordingly, *Giordano* and *Chavez* teach that suppression is not warranted for delays in serving the required notices, in the absence of any prejudice resulting from such delays.[5]

2. Petitioners contend that the evidence against them should have been suppressed because the wire interception application and order named only Tousa although the government allegedly had probable cause to believe that the Civellas would also be overheard discussing illegal activities over the target telephone.

a. Petitioner Tousa does not have standing to seek suppression on this basis. Tousa was named in the application and order, and thus cannot seek suppression of the evidence on the ground of any failure to identify him; instead, he asserts a defect relating solely to two others. But Tousa cannot here assert the rights of the Civellas as a basis for suppression of evidence obtained without violation of his own rights. "[S]tanding to invoke the exclusionary rule had been confined to situations where the Government seeks to use such

[5]The court in *United States* v. *Smith*, 463 F. 2d 710 (C.A. 10), noted that the inventory notice provision of Section 2518(8)(d) was modeled on conventional search warrant procedure as defined in Rule 41(d), Fed. R. Crim. P. See Senate Rep. No. 1097, 90th Cong. 2d Sess. (1968), 711. Since failure to comply with the return and filing requirements for conventional search warrants justifies suppression of the evidence seized only upon an affirmative showing of prejudice, the *Smith* court correctly concluded that the same rule should apply to the 90 day notice provision of Section 2518(8)(d). Accord, *United States* v. *Rizzo*, 492 F. 2d 443, 447 (C.A. 2).

evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348. The traditional standing rules were incorporated into the suppression sections of the wire interception statute. 18 U.S.C. 2518(10)(a); S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 171-172, 175 n. 9. Having been named in the application and order, Tousa cannot claim that he was a victim of an unlawful search; therefore, he has no standing to seek suppression based upon a failure to identify other individuals. *United States* v. *Scully, et al.*, C.A. 9, Nos. 74-2479, 74-2295, 74-1891, 74-1887, decided May 24, 1976.[6]

[6]*United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838-839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518 (10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F. 2d 957, 958, n. 1 (C.A. 5), petition for a writ of certiorari pending, No. 75-963. In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*. See *Donovan* brief, pp. 34-36. But see *United States* v. *Picone*, 408 F. Supp. 255, 262 (D. Kan.), appeal pending, C.A. 10, No. 76-1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2), in which the court assumed without deciding that a named conspirator had standing to object to the failure to name a co-conspirator, but then concluded the objection was without merit.

b. The government did not have probable cause to believe that it would overhear Nicholas Civella discussing illegal activities over the telephone involved. Therefore, even assuming the court of appeals in *Donovan* correctly interpreted Section 2518(1)(b)(iv), the failure to name Nicholas Civella in the wire interception application and order was not improper.

The finding of the court of appeals that there was sufficient probable cause to name Nicholas Civella was based upon the affidavit of FBI Agent William Ouseley (R. 364-374).[7] But, far from supporting a finding of probable cause, Ouseley's affidavit indicates that Nicholas Civella had insulated himself from the day-to-day details of the gambling operation. The affidavit contains no example of any use of a telephone by Nicholas Civella himself. Instead, it explains that he was "the boss of the Kansas City 'Outfit' * * * a term used in describing the organized crime element * * * " (R. 365), and that Tousa was "running the bookmaking operation for [him]" (R. 366).

The affidavit does not establish probable cause to believe that Nicholas Civella would be overheard engaging in illegal conversations over the target telephone. Absent a belief that conversations of Nicholas Civella would be overheard, naming him in the interception application is not required, 18 U.S.C. 2518(1)(b)(iv), and the failure to name him does not justify suppression. *United States* v. *Bernstein*, 509 F. 2d 996, 1001 (C.A. 4), certiorari pending, No. 74-1486. *United States* v. *Martinez*, 498

[7] Ouseley's affidavit was submitted to the district court in the January 7, 1970, *ex parte* proceeding in which the government sought orders authorizing the use of a pen register and a telephone interception. See *infra* pp. 9-11.

F. 2d 464, 468 (C.A. 6); *United States* v. *Russo*, 527 F. 2d 1051 (C.A. 10), certiorari denied June 1, 1976, No. 75-1218.

c. Although we do not dispute the court of appeals' conclusion that the government had probable cause to name Anthony Civella in the intercept application, the court also correctly held that the failure to name him does not justify suppression in the absence of any showing of prejudice resulting from the omission.[8] See also *United States* v. *Doolittle*, 507 F. 2d 1368 adhered to in rehearing *en banc* 518 F. 2d 500 (C.A. 5), petition for a writ of certiorari pending, No. 75-513. But whether this holding is correct will be determined by this Court in *Donovan*, and the result of that case will control the disposition of petitioner Anthony Civella's claim. If this Court resolves the naming issue in *Donovan* in the government's favor, the decision below is correct and the petition should be denied. On the other hand, should the Court sustain the *Donovan* court of appeals on this issue, the intercept evidence against Anthony Civella should have been suppressed, and the petition should be granted with respect to him and his case remanded to the court of appeals.

3. Section 2518(1)(b) requires that an interception application contain "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued * * * ." In the government's application here, Special Attorney David Martin of the Department of Justice stated that he based his knowledge upon an affidavit of FBI Agent Spencer Hellekson, a copy of which

[8] The fact that he received inventory notice precludes such a showing.

was supposedly attached to the application. In fact, no such affidavit was attached; instead, at the *ex parte* hearing at which Judge Collinson approved this application and one to install a pen register (see note 7, *supra*), FBI Agent William Ouseley was present and submitted an affidavit in support of the government's applications.

The explanation for these events is fairly summarized by the court below:

> The record makes it clear that at least two Special Agents of the FBI were concerned in the investigation. One of them was Mr. Hellekson, and the other was Special Agent William N. Ouseley. The original affidavit in support of the application was prepared and signed by Hellekson and was mentioned in the application that was prepared at about the same time. However, when the Hellekson affidavit was considered in the Department of Justice it was found to be insufficient in content. A new affidavit was then prepared and executed by Ouseley, and that was the affidavit that was ultimately submitted to and considered by Judge Collinson on January 7, 1970. The whole problem arises from the fact that Mr. Martin simply failed to change his original application that mentioned the Hellekson affidavit. [Pet. App. A-10 to A-11].

Since Judge Collinson read and considered Agent Ouseley's affidavit during the hearing on the government's interception application (Pet. 18-19), he was presented with a full statement of the facts upon which attorney Martin relied in requesting interception orders and the requirements of Title III were satisified. As the court of appeals correctly observed, any error was essentially clerical:

> [it] did not influence Judge Collinson or anyone else in concluding that wiretap authority should be granted, and it did not prejudice the defendants. Therefore, it can be ignored. *Cf. United States* v. *Chavez*, *supra*, 416 U.S. at 573-80; *United States* v. *Schaefer*, 510 F. 2d 1307, 1310 (8th Cir.), *cert. denied*, 421 U.S. 975 (1975); *United States* v. *Thomas*, 508 F. 2d 1200, 1203 (8th Cir.), *cert denied*, 421 U.S. 947 (1975); *United States* v. *John*, *supra*, 508 F. 2d at 1137; *United States* v. *Brick*, 502 F. 2d 219, 222-23 (8th Cir. 1974). [Pet. App. A-10].

CONCLUSION

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied with respect to petitioners Frank Tousa and Nicholas Civella, and that action on the petition with respect to Anthony Civella should be deferred pending this Court's disposition of *United States* v. *Donovan*, No. 75-212.

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